

**Ideal Macaroni Company and Teamsters Local No. 407 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.**<sup>1</sup> Case 8-CA-23534

July 23, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On April 30, 1991, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 8-RC-13426. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On May 29, 1991, the General Counsel filed a Motion for Summary Judgment. On June 5, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On June 26, 1991, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of the Board's disposition of certain challenged ballots in the representation proceeding. In its response to the Motion for Summary Judgment, the Respondent further argues that it has a good-faith doubt of the Union's majority status because of the passage of time and employee turnover, citing *Camvac International*, 302 NLRB 652 (1991), in support of its argument.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We do not find relevant the Respondent's citation to *Camvac International*. In that case the issue was whether, because of the respondent's unfair labor practices, the possibility of conducting a fair election

was slight and whether the employees' representation desires expressed through authorization cards would be better protected by issuing a bargaining order. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Here, the employees' desires for representation were determined through a Board-conducted election. See *Brooks v. NLRB*, 348 U.S. 96 (1954); *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964). We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Ideal Macaroni Company, an Ohio corporation, has been engaged in the manufacture and distribution of macaroni and other pasta products at its facility in Bedford Heights, Ohio, where it annually purchases and receives materials valued in excess of \$50,000 directly from points outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held May 21, 1986, the Union was certified on February 25, 1991, as the collective-bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees, sanitation employees, packing employees, warehouse employees and drivers employed by the Respondent at its Bedford Heights, Ohio facility, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since March 13, 1991, the Union has requested the Respondent to bargain, and, since March 18, 1991, the Respondent has refused. We find that this refusal con-

<sup>1</sup> On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

<sup>2</sup> We deny the General Counsel's motion to strike certain denials in the Respondent's answer.

stitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By refusing on and after March 18, 1991, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

#### ORDER

The National Labor Relations Board orders that the Respondent, Ideal Macaroni Company, Bedford Heights, Ohio, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Refusing to bargain with Teamsters Local No. 407 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All production and maintenance employees, sanitation employees, packing employees, warehouse employees and drivers employed by the Respondent at its Bedford Heights, Ohio facility, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Bedford Heights, Ohio, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER CRACRAFT, dissenting.

In the underlying representation proceeding, the initial tally of ballots revealed that 15 votes were cast for, and 15 against, the Union, with 4 determinative challenged ballots. 301 NLRB 507, 510 (1991). I joined my colleagues in overruling the challenge to one of these ballots, but dissented from their decision to open and count the remaining three. *Id.* at 510-511 fn. 15. Thereafter, a revised tally of ballots was prepared, which showed that the Union won the election by a vote of 18 to 16. Thus, it is clear that the three erroneously overruled challenged ballots were critical in providing the Union with its margin of victory. Therefore, in my view, the Union's certification was improper. Accordingly, I would deny the General Counsel's Motion for Summary Judgment, and I dissent from my colleagues' finding of a violation of Section 8(a)(5).

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Teamsters Local No. 407 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All production and maintenance employees, sanitation employees, packing employees, ware-

house employees and drivers employed by the Respondent at its Bedford Heights, Ohio facility, excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

IDEAL MACARONI COMPANY